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No. 82-666

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MILLER BREWING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
ERVIN SZEWCZUGA and GERALD TREICHEL,
Respondents.

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS SZEWCZUGA AND TREICHEL

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QUESTION PRESENTED FOR REVIEW

Respondents Szewczuga and Treichel frame the issue as follows:

Whether union officials who participate in but do not lead unlawful strike activity may be singled out for more severe discipline under a general no-strike clause simply because they are union officials?

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Other Authorities:

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STATEMENT OF THE CASE

In November, 1977 Miller Brewing Company discharged respondents Szewczuga and Treichel (A. 68). Szewczuga and Treichel were stewards to provide in plant representation to the members of Local Union 494, International Brotherhood of Electrical Workers, AFL-CIO in Miller's employ and had 26 and 12 years respectively of unblemished service as electricians at Miller's Milwaukee brewery (A. 69-A. 70). Following a short two hour work stoppage by first shift electricians in their departments during which the two stewards merely accompanied the members to the union hall in an effort to keep order, Miller summarily terminated both men while imposing only three day suspensions on all others who left the brewery (A. 28, A. 40, A. 72). Since the stewards were fired, no electrician has

been willing to serve as steward at the brewery (A. 76). Based on findings that the two stewards "could have done little else but what they did" and did "attempt to quell the rising tide favoring that walkout" and that their employer had neither a "basis for believing" nor a "good faith belief" that the stewards had incited, encouraged or led the walkout, the National Labor Relations Board concluded that Miller fired them based upon "their union stewardship position alone." (A. 29, A. 13)

Neither the collective bargaining agreement which merely contained a general no-strike clause nor prior arbitration awards imposed any special obligations upon union stewards in unlawful strike situations or in any other way waived their statutory protection against discrimination because of their union status (A. 75, A. 44). Although an arbitrator had ruled against the discharge grievances of Szewczuga and Treichel before the administrative hearing opened in this case, the award was not introduced into evidence or relied upon by Miller before the Board (A. 71, A. 15-A.16). The court of appeals ruled that Miller's failures in these respects were not excused by extraordinary circumstances and therefore that § 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e), barred Miller from objecting to the Board's order based upon the arbitrator's *post hoc* interpretations of the collective bargaining agreement (A. 18-A. 20).

SUMMARY OF ARGUMENT

The petition for certiorari in this case should be denied because the slim possibility that the Court will reach and decide the second question upon which the writ was granted in *Metropolitan Edison* v. *NLRB*, 663 F.2d 478 (3d Cir., 1981), *cert. granted* No. 81-1664 (June 14, 1980) contrary to the way it has been answered by the Board and all reviewing courts to date is clearly outweighed by the certain damage these respondents and their fellow working people will sustain if justice is delayed for the many more months that it may take for this Court to act

if a ruling on this petition is held in abeyance. Although the circuits are divided on whether prior arbitral interpretations imposing special duties upon union officials under general no-strike clauses are the legal equivalents of clear contract language to this effect, that issue, the first question upon which certiorari was granted in *Metropolitan Edison,* is not presented here. Unless that question is answered in the negative, this Court's decision in *Metropolitan Edison* will not be dispositive of the issue here, which is the second question presented in that case, but the one on which the Board and all of the reviewing circuits are presently in agreement. Thus, although the bare possibility that the decision in *Metropolitan Edison* will have some bearing on the issue here cannot be ruled out, the petition should be denied because of the direct harm that further substantial delays in obtaining a final adjudication will surely work upon the individual respondents in this case, who have already waited five years for the legal process to vindicate their rights.

ARGUMENT

I. Miller's Petition For Certiorari Should Be Denied Since Neither The Contract Nor Prior Arbitral Awards Imposed Any Special Duties Upon Stewards Szewczuga And Treichel, And Since They Did Not Act As Leaders Of The Strike.

In this case, it is undisputed that the collective bargaining agreement did not impose any special duties upon stewards Szewczuga and Treichel. Nor is there any issue in this case as to the effect of a *prior* arbitration award on the actions of the stewards in connection with the walkout. Indeed, Miller's belated attempts to utilize the award supposedly rendered regarding the discharges of Szewczuga and Treichel were properly rejected by the court of appeals. Thus there is no issue here regarding the effect of a prior arbitration award or a collective bargaining agreement which contains specific language imposing special duties upon stewards.

Contrary to Miller's disingenuous assertions, in *Metropolitan Edison* this Court granted certiorari on two questions, only the second of which may have any significance to the issues before the Court in this case:

> "(1) Does NLRB or Court of Appeals have authority to disregard clear, unambiguous and repeated arbitral interpretation of collective bargaining agreement and substitute its own contrary interpretation.
>
> (2) May union officials be held to higher duty than rank-and-file employees to uphold collectively bargained no-strike pledge, including obligation to take affirmative steps to end any action in breach thereof, and does employer commit unfair labor practice by selectively disciplining union officials for failing to satisfy that duty?"[1]

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[1] 50 U.S.L.W. 3974.

The first question is the one on which the circuits appear to be divided;[2] but because no arbitrator had previously interpreted Miller's collective bargaining agreement asimposing any special duties upon stewards and because Miller did not raise this defense before the Board that question is not posed in this case.

The courts are unanimous in upholding the Board's position on the second question in the circumstances presented here. The courts have consistently held that selective discipline of union stewards, absent a contractual basis for a higher responsibility or proof that the stewards have acted as leaders of the strike, violates the National Labor Relations Act. See *Metropolitan Edison, supra,* 663 F.2d at 481; *Fournelle, supra,* 670 F.2d at 338; *C. H. Heist Corp.* v. *NLRB,* 657 F.2d 178, 182-183 (7th Cir. 1981); and most recently *NLRB* v. *South Central Bell Telephone Co.,* 688 F.2d 345, (5th Cir. 1981). Thus the question presented by this case is one on which the Circuits are in perfect accord. Further, this Court may well not even reach that issue in *Metropolitan Edison.*

Therefore Miller's assertion that this Court in *Metropolitan Edison* is presented with the same issue as in this case[3] grossly exaggerates the issues presented here. Rather, the possibility that this Court will reach the second question in *Metropolitan Edison* is speculative and the chances that, if it does, it will reverse the Board and courts of appeals are at best remote. On the other hand, the effect of granting certiorari or, as the Board contends, holding this case in abeyance until *Metropolitan Edison* is decided, will be both direct and substantial upon the

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[2] Compare *Fournelle* v. *NLRB,* 670 F.2d 331, 341-345 (D.C. Cir. 1982), with *Metropolitan Edison* v. *NLRB,* 663 F.2d at 483-484.

[3] Petition for Certiorari, p. 6 n. 2.

individual petitioners. It will cause a further delay for a substantial period of time. A final decision in this case has been delayed far too long already and there appears to be no good reason why this litigation should not now come to an end.

In summary, the decision of the Court of Appeals for the District of Columbia Circuit is in perfect accord with that of every other court of appeals which has considered the question. Absent specific contractual obligations imposing higher duties on union officials or proof that those officials acted as leaders of the strike, union officers and stewards may not be disparately disciplined for mere participation in, or the failure to take affirmative steps to end, a wildcat strike.[4] Thus this case raises no issues of compelling importance and certiorari should be denied.

CONCLUSION

Respondents submit that the court of appeals correctly held, in accordance with the ruling of the Board and every other court of appeals that has passed on this issue, that Miller violated the federal labor statute when it singled out respondents Szewczuga and Treichel for discharge based solely upon their status as stewards. Although it is possible that the Court will reach and answer the question presented here later this Term, the possibility that it will both reach that issue and overrule the unanimous holdings of the Board and appellate courts on that issue seems extremely remote. Therefore, in light of the direct and certain prejudice to individual respondents' interests further delays will cause, the petition should be denied.

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[4] For an excellent overview of the development of the law in this area and a synthesis of the relevant cases, see Rummage, *Union Officers and Wildcat Strikes: Freedom From Discriminatory Discipline*, 4 Indus. Rel. L. J. 258 (1981).

Alternatively, individual respondents concur in the Board's view that the petition for certiorari should be held and disposed of in light of the Court's decision in *Metropolitan Edison,* No. 81-1664, since that matter has already been fully briefed and is awaiting oral argument.

Respectfully submitted,

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